CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

WILLIAM DANZER & COMPANY, INC., PLAINTIFF IN ERROR,

vs.

GULF & SHIP ISLAND RAILROAD COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED [illegible]

([illegible])

(30,235)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 346

WILLIAM DANZER & COMPANY, INC., PLAINTIFF IN ERROR,

vs.

GULF & SHIP ISLAND RAILROAD COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fols. 1 & 2] **IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI**

WILLIAM DANZER & COMPANY, INCORPORATED, a Corporation, Plaintiff,

vs.

GULF & SHIP ISLAND RAILROAD COMPANY, a Corporation, Defendant

BILL OF COMPLAINT—Filed April 28, 1923

The plaintiff claims of the defendant three hundred seven dollars and fifteen cents ($307.15), with interest from the 3rd day of October, 1917, as reparation on account of damages due to a violation of the Interstate Commerce Act. The plaintiff avers that said violation of the Interstate Commerce Act consisted of the following:

On or about the 30th day of August, 1917, there was shipped from Lyman, Mississippi, a quantity of lumber, to wit, a carload of lath, consigned to Wilkes-Barre, Pennsylvania, and routed "N. & W. and Hagerstown," meaning that the said shipment should be so transported as to move over the lines of the Norfolk & Western Railway Company, and through the city of Hagerstown, Maryland. After said lumber was shipped it was purchased by plaintiff, who, in due time, directed that it be stopped in transit; but the defendant [fol. 3] had misrouted said shipment, contrary to the provisions of the Interstate Commerce Act, and had unlawfully taken or sent it away from the control of the owner thereof by sending it over a wholly unauthorized route so that it became lost to the owner, the defendant's act being tantamount to a wrongful conversion of the property.

The plaintiff further avers that the facts on which said claim is based are set out more fully and are truly stated in a certain report and order of the Interstate Commerce Commission, a full, true and correct copy of which is hereto attached, marked "Exhibit A", and is hereby expressly made a part of this count.

Brenton K. Fisk, Attorney for Plaintiff.

"EXHIBIT A" TO BILL OF COMPLAINT

7665

INTERSTATE COMMERCE COMMISSION

No. 12250

WILLIAM DANZER & COMPANY, INCORPORATED,

vs.

GULF & SHIP ISLAND RAILROAD COMPANY et al.

Submitted August 1, 1921; Decided May 18, 1922

Carload of Lath from Lyman, Mississippi, to Wilkes-Barre, Pa., [fol. 4] found misrouted. Damages awarded

Brenton K. Fisk for complainant.
Adams Dodson for Pennsylvania Railroad Company.

Report of the Commission

Division 3, Commissioners Hall, Eastman, and Campbell

BY DIVISION 3:

Exceptions were filed by complainant to the report proposed by the Examiner. We have reached conclusions differing from those which he recommended.

Complainant, a corporation buying and selling lumber at Hagerstown, Md., by complaint filed February 14, 1921, seeks reparation for damages alleged to have been suffered by it through the misrouting of a carload of lumber. On brief, the Pennsylvania Railroad, one of the defendants, urges that complainant's claim was barred by the statute of limitations at the time of the passage of the transportation act, 1920, and that it was not revived by section 206 (f) of that act, providing that the period of Federal control should not be computed as part of the periods of limitation in claims for reparation arising prior to Federal control. We have found otherwise. Mulkey Salt Co. v. Director General, 61 I. C. C., 669.

The shipment, consisting of 96,050 feet of 4-foot No. 2 standard yellow pine lath, weighing 56,100 pounds, was delivered to the Gulf & Ship Island at Lyman, Miss., August 30, 1917, by the Ingram-Day Lumber Company, consigned to V. W. Long Lumber Company, Wilkes-Barre, Pa., routed "N. &. W. and Hagerstown." [fol. 5] The same day complainant purchased it as a "speculative buy" and in due course came into possession of the bill of lading. On September 5 it wrote to the Division Freight Agent of the Pennsylvania at Harrisburg, Pa., and to representatives of the

Cumberland Valley at Chambersburg, Pa., and Hagerstown, requesting that the car "be held in transit for diversion." Complainant resold the lath at $5.00 per 1,000 feet and forwarded the invoice to its customer who, in urgent need of such material, had contracted for it because it was in transit. The Gulf & Ship Island made several attempts to forward the car in accordance with routing instructions by transferring it to the New Orleans & Northeastern at Hattiesburg, Mississippi, but that carrier refused to receive it because of an embargo. Eventually, on September 15, the Gulf & Ship Island turned the car over to the Louisville & Nashville, at Gulfport, Mississippi. Moving over the Louisville & Nashville to Louisville, Ky., and Pennsylvania lines beyond, the car arrived in Wilkes-Barre about October 3 without passing through Hagerstown. The shipment was therefore misrouted.

It appears that when complainant's customer was advised of the arrival of the car at Wilkes-Barre it cancelled the order. While the car was held on the initial line some fourteen or fifteen days, there is no evidence that the sale made by complainant was revoked or that it was obliged to recall its invoice until informed that the car had arrived at Wilkes-Barre. The Pennsylvania refused to forward the car to Hagerstown unless all charges were paid, including demurrage which had accrued as well as the charges for the [fol. 6] movement from Wilkes-Barre to Hagerstown, and complainant declined to accept delivery. Thereupon the lath was sold at auction by the Pennsylvania for $200.00 and the proceeds applied in partial satisfaction of transportation, demurrage, storage and unloading charges aggregating $473.51.

Complainant contends that the Gulf & Ship Island could and should have forwarded the car via Gulfport, Miss., and either over the Louisville & Nashville to Birmingham, Ala., Alabama Great Southern to Chattanooga, Tenn., Southern to Bristol, Tenn., and Norfolk & Western to Hagerstown, or over the Louisville & Nashville to Norton, Va., and Norforlk & Western to Hagerstown. The record indicates that these routes were open and that the shipments could have moved via either.

Defendants contend that we are without jurisdiction to award damages for loss, damage, delay or conversion of property. In L. & N. R. R. Co. vs. Ohio Valley Tie Company, 342 U. S. 288, the Supreme Court said:

"The Court of Appeals decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge and that the satisfaction of the Commission's award still left open an action in the state courts to recover what are termed general damages—such as are supposed to have been recovered in this case. In this we are of the opinion that the court was wrong.

By Section 8 a common carrier violating the commands of the act is made liable to the person injured thereby "for the full amount of damages sustained in consequence" of the violation. By Section 9 any person so injured may make complaint to the Commission

or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule [fol. 7] of damages in one can hardly be different from that proper in the other. * * * The decisions say that whatever the damages were they could be recovered; Pennsylvania R. R. Co. vs. International Coal Mining Co., 230 U. S. 184, 202, 203; Meeker vs. Lehigh Valley R. R. Company 236 U. S. 412, 429; and the statute determines the extent of damages. Pennsylvania Railroad Company vs. Clark Brothers Coal Mining Co., 238 U. S. 456, 472. We are of opinion that all damages that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damages to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid."

The misrouting here was clearly a violation of the interstate commerce act, and the complainant having elected to prosecute its claim before us we may award reparation for whatever damages resulted as a consequence of such unlawful act.

Witness for complainant testified that the reasonable market value for the lath at Wilkes-Barre in October, 1917, was $5.00 per 1,000 feet or about $480.00 for the entire shipment, and at Hagerstown $4.95 per 1,000 feet. Freight charges from Lyman to Hagerstown over the designated route would have been $168.30.

We find that complainant made the shipment as described; that it was misrouted; that complainant was damaged by the misrouting in the amount of the difference between $475.45, which we find to be the fair market value of the lumber in September and October, 1917, at Hagerstown, and $168.30, the freight charges from Lyman to Hagerstown, this difference being $307.15; and that it is entitled to reparation from the Gulf & Ship Island Railroad Company in the sum of $307.15, with interest.

An appropriate order will be entered.

[fol. 8] HALL, Commissioner, dissenting in part:

I agree that this shipment was misrouted. The burden is upon complainant to show that the misrouting was the proximate cause of damage. This has not been done. The record does not show when or why the sale by complainant to the Lebanon Box Company was revoked. It may have been before the car left the Gulf & Ship Island and because of delay regardless of the route of movement. The Lebanon Box Company was in need of lath and agreed to buy this lath because it was in transit and quick delivery could be looked for. Complainant refused to accept delivery at Wilkes-Barre, the billed destination, although there had been no reconsignment and the charges were the same over the route of movement as over the route designated by the consignor.

If it were shown that the loss of the sale to the Lebanon Box

Company resulted from the misrouting, there would still be no warrant for fixing the amount of damage at the market price of the lath at Hagerstown less the freight to that point. The record does not show that this company was located at Hagerstown or that under the terms of sale the lath was to be delivered there. The instructions that the car "be held in transit for diversion" were addressed to representatives of the Pennsylvania at Harrisburg and the Cumberland Valley at Chambersburg, as well as the representative of the latter road at Hagerstown.

The shipment moved nearly five years ago. Complainant has not proved its case, if it has one, and the complaint should be dismissed.

Order

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office, in Washington, D. C., on the 18th day of May, A. D. 1922

No. 12250

WILLIAM DANZER & COMPANY, INCORPORATED,

vs.

GULF & SHIP ISLAND RAILROAD COMPANY, LOUISVILLE & NASHVILLE Railroad Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company, Western Lines, and Norfolk & Western Railway Company

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is [fol. 10] hereby referred to and made a part hereof:

It is ordered that the Gulf & Ship Island Railroad Company be, and it is hereby, authorized and directed to pay unto complainant, William Danzer & Company, Incorporated, on or before August 2, 1922, the sum of $307.15, with interest thereon at the rate of 6 per cent per annum from October 3, 1917, as reparation on account of damages sustained due to the misrouting of carload of lumber shipped from Lyman, Mississippi.

By the Commission, Division 3.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 11] UNITED STATES OF AMERICA,
Eastern Division of the Southern
District of Mississippi, ss:

IN UNITED STATES DISTRICT COURT

SUMMONS AND SHERIFF'S RETURN—Filed May 8, 1923

The President of the United States to the Marshal of the Southern District of Mississippi, Greeting:

We command you, that without delay, you summon The Gulf & Ship Island Railroad Company, a corporation, defendant, having an office and place of business in said Division of said District of the State of Mississippi, that it be and appear at the District Court of the United States, to be held at the Court room thereof, in the City of Meridian, Mississippi, on the 2nd Monday of September next, the 10th day of September, 1923, to answer William Danzer & Company, Incorporated, a corporation, of a plea claiming reparation on account of damages due to a violation of the Interstate Commerce Act, the amount of said claim being $307.15, with interest from the 3rd day of October, 1917, and that it do file its plea or defense in said Court on or before the said meeting thereof, or judgment will be given against it be default; and have you then there this writ, and how you have executed the same.

Witness the Honorable E. R. Holmes, Judge of the District Court of the United States, and the seal of our said District Court, this 28th day of April, A. D. 1923.

Jack Thompson, Clerk, by E. H. Dial, D. C. (Seal.)

[fol. 12] [File endorsement omitted.]

Received this summons May 7, 1923, at Jackson, Mississippi, and executed same May 7, 1923, at Jackson, Miss., by handing a true copy of this summons to F. P. Wilson, Agent for the Gulf & Ship Island R. R.

J. C. Tyler, U. S. Marshal, by J. H. Gearhart, Deputy.

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION FOR SUBMISSION—Filed September 10, 1923

It is stipulated and agreed by and between the parties hereto through their attorneys as follows:

That this cause be submitted on the demurrer of the defendant to the declaration to be heard in vacation and decided thereon, and that the defendant file memorandum brief in suport of its demurrer

within twenty (20) days from this date and that plaintiff file reply brief within twenty (20) days thereafter, and defendant file rejoinder brief within five (5) days thereafter.

It is further stipulated that should the demurrer be overruled that issue be joined and the cause decided by the presiding Judge on the merits. It is further stipulated that the evidence in the case shall be as follows:

The stenographer's minutes of the proceedings before the Interstate Commerce Commission, the report including the finding of [fol. 14] facts and order by said commission.

It is further stipulated that the Court shall fix and assess such attorney's fee as shall be proper if the finding is in favor of plaintiff.

This 10th day of September, 1923.

Brenton K. Fisk, Atty. for Plaintiff. T. J. Wills, Atty. for Defendant.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUBMISSION OF CAUSE—Filed September 10, 1923

It is ordered that the above styled cause be and the same is submitted to be heard in vacation by the Court in accordance with the stipulations made by and between the parties this day in said cause.

Ordered and adjudged this the 10th day of September, 1923.

O. K. E. R. H.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT.

[Title omitted]

DEMURRER—Filed September 10, 1923

Now comes the defendant in the above styled cause and demurs to the declaration therein exhibited against it and for cause of demurrer assigns the following, to wit:

1. As construed and applied to the instant case by the Interstate Commerce Commission, Section 206, Paragraph F, of the Transportation Act of 1920 is unconstitutional and void because it seeks to revive a cause of action that was dead when the act was passed, and its revival constitutes a taking of defendant's property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

[fol. 17] 2. Section 16, Paragraph 2, of the Act to Regulate Commerce, insofar as it makes the finding of the Commission prima facie evidence in the instant case, is unconstitutional and violative of the Seventh Amendment of the Constitution of the United States, which said amendment guarantees the right of trial by jury where the value in controversy exceeds $20.00.

3. The facts stated by the Interstate Commerce Commission show that an improper judgment was entered thereon and that the judgment should have been for the defendant and not for the plaintiff.

And for further causes to be assigned upon the hearing.

B. E. Eaton, T. J. Wills, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO CORRECT ERROR IN DEMURRER—Filed September 17, 1923

Application of Defendant to Correct Clerical Error in Its Demurrer Filed in the Foregoing Cause

To the Honorable Edwin R. Holmes, Judge:

The defendant respectfully states to the Court that a clerical error occurs in stating the first ground of demurrer already filed by this defendant, in this: the statement is made that the act complained of was the taking of defendant's property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States. It was intended to say the Fifth Amendment and not the Fourteenth.

Wherefore application is made for permission to correct said error by striking out the word "Fourteenth," in the first ground of demurrer and inserting therein the word "Fifth."

[fol. 19] Respectfully submitted.

B. E. Eaton, Attorney for Defendant.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO CORRECT ERROR IN DEMURRER—Filed September 27, 1923

This cause coming on to be heard on the application of the defendant to correct the first ground of demurrer and the court being advised

that the statement in said demurrer was to the effect that the act complained of constituted a taking of defendant's property without due process of law in contravention of the Fourteenth Amendment to the constitution of the United States and that it was intended to charge in contravention of the Fifth Amendment, and not the Fourteenth, the Court hereby grants the application and hereby directs the Clerk to strike out the word "Fourteenth" in said ground of demurrer and to insert in lieu thereof the word "Fifth."

Ordered this the 18th day of September, 1923.

E. R. Holmes, Judge.

[fol. 21] [File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed October 26, 1923

The failure of the plaintiff to file complaint within the two years from the time the cause of action accrued, prescribed by Section 16 of the Interstate Commerce Act, resulted in, not only the remedy being barred, but the liability destroyed by lapse of time. Consequently, Section 206 (f) of the Transportation Act will not here be construed as reviving the cause of action because, if so construed, it would be in violation of the Constitution of the United States.

Accordingly the demurrer will be sustained, and an appropriate order may be submitted for my signature by the attorney for the defendant.

This 25th day of October, A. D. 1923.

[fol. 23] E. R. Holmes, U. S. District Judge.

[File endorsement omitted.]

[fols. 24-31] EXHIBIT IN EVIDENCE: REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION—Omitted; printed side page 3 ante

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed February 6, 1924

This cause having come on regularly on Monday, the tenth day of September, 1923, being a day of the September term, A. D. 1923, of the District Court of the United States for the Southern District of Mississippi, Eastern Division, to be tried before the Court and a jury to be empaneled; Brenton K. Fisk, Esquire, appearing as attorney for the plaintiff; T. J. Wills, Esquire, appearing as attorney for defendant; and a stipulation, together with that certain finding of facts by the Interstate Commerce Commission therein designated,

having been filed in open Court, and it appearing that said stipulations contains an express waiver of the right of trial by jury herein; [fol. 33] and said cause having thereupon come on to be tried by the Court, sitting without a jury; and said cause having been duly presented by briefs and written arguments of counsel for both parties; and said cause having been submitted to the Court for its consideration and final decision; and on the 25th day of October, 1923, conclusions of law which finally dispose of the case having been filed by the Court herein, and the Court having ordered that, in accordance with such conclusions of law, final judgment be entered in favor of the defendant and against the plaintiff.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, plaintiff declining to plead further, judgment is hereby rendered in favor of the Gulf & Ship Island Railroad Company, defendant herein, and against William Danzer & Company, Inc., plaintiff herein, but without costs.

This January 24th, 1924.

E. R. Holmes, Judge.

Judgment entered —— —, 1924.

Jack Thompson, Clerk, by E. H. Dial, Deputy Clerk.

[fol. 34] [File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT.

[Title omitted]

MOTION TO TAX COSTS—Filed September 10, 1923

Comes now the plaintiff and hereby moves the Court to tax against the defendant as a part of the costs in this case the plaintiff's attorney's fee for the work incident to the handling of the above styled cause in this court, said fee to be taxed in a reasonable sum, to wit, two hundred and fifty ($25-.00) Dollars.

Brenton K. Fisk, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT.

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed February 18, 1924

Comes now William Danzer & Company, Inc., plaintiff herein and says:

That on or about the 6th day of January, 1924, the District Court entered judgment herein in favor of the defendant and against the plaintiff in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this

plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of said errors, and that a transcript of the record, pro-
[fol. 37] ceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Brenton K. Fisk, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed February 18, 1924

The plaintiff in this action in connection with his writ of error, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

First. The Court erred in sustaining the demurrer of defendant to the petition of the plaintiff.

Second. The Court erred in holding Section 206 (f) of the "Transportation Act of 1920," in its application to this cause, to be in violation of the Fifth Amendment to the Constitution of the United States.

Third. The Court erred in holding that the Fifth Amendment to the Constitution of the United States necessitates a construction of section 206 (f), "Transportation Act of 1920," which excludes the present cause from the operation and benefit thereof.

[fol. 39] Fourth. The Court erred in entering judgment in favor of the defendant.

Wherefore, the plaintiff prays that the judgment of the District Court be reversed.

Brenton K. Fisk, Atorney for Palintiff.

[File endorsement omitted.]

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed February 18, 1924

This 13th day of February, 1924, comes the plaintiff, by his attorney, and files herein and presents to the Court his petition praying for the allowance of a writ of error, and an assignment of errors

intended to be urged by him, praying also that a transcript of the records and proceedings and papers upon which the judgment herein rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the plaintiff's giving bond according to law in the sum of One Thousand ($1,000.00) Dollars.

E. R. Holmes, as Judge of the District Court of the United States for the Southern District of Mississippi.

[fol. 41] [File endorsement omitted.]

[fol. 42] THE UNITED STATES OF AMERICA, ss:

IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed February 18, 1924

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of Mississippi, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you, between William Danzer & Company, Inc., plaintiff, and Gulf & Ship Island Railroad Company, defendant, a manifest error has happened, to the great damage of the said William Danzer & Company, Inc., as by its complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment is herein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the 14th day of March, next, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to correct that error, what of right, and according to the laws and customs of the United States, should be done.

[fol. 43] Witness the Honorable William Howard Taft, chief justice of the United States, the 13th day of February, in the year of our Lord one thousand nine hundred and twenty-four.

Jack Thompson, Clerk of the District Court of the United States for the Southern District of Mississippi. (Seal.)

Allowed by E. R. Holmes, District Judge

[File endorsement omitted.]

[fols. 44-46] BOND ON WRIT OF ERROR FOR $1,000—Approved and filed February 18, 1924; omitted in printing

[fols. 47 & 48] CITATION—In usual form, showing service on B. E. Eaton; filed February 18, 1924; omitted in printing

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[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed February 18, 1924

Comes now William Danzer & Company, Inc., a corporation, the plaintiff in error above named, pursuant to Rule 8 of the Supreme Court of the United States, and for the purpose of enabling the clerk to prepare the record for appeal herein from the decision of the District Court to the Supreme Court of the United States, hereby request the clerk to incorporate the portions of the record into the transcript of the record of such appeal which are hereinafter indicated, to wit:

(1) The petition or declaration with exhibits incorporated therein.
(2) The process and return.
(3) The defendant's demurrers.
(4) The stipulation under which the cause was submitted for judgment.
(5) The judgment.
(6) The opinion of the Court.
(7) The finding of facts and order of Interstate Commerce Commission with certification thereof filed as an exhibit.
(8) Petition for writ of error.
(9) Assignment of errors.
[fols. 50 & 51] (10) Bond and approval.
(11) Allowance of writ of error.
(12) Writ of error.
(13) Citation in error with return thereon.
(14) Order of court that cause be heard in vacation.
(15) Motion to tax attorney's fee on defendant.
(16) Application to correct error on demurrer.
(17) Order allowing such correction.
(18) Clerk's Certificate.

Brenton K. Fisk, as Attorney for Plaintiff in Error.

I hereby accept service of a copy of the foregoing præcipe and waive all other or further service or notice thereof. This the 19th day of February 1924.

B. E. Eaton, as Attorney for Defendant in Error.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S ADDITION TO PRÆCIPE FOR TRANSCRIPT OF RECORD—
Filed February 29, 1924

Now comes the Gulf & Ship Island Railroad Company, a corporation, defendant in error in the above styled cause, pursuant to Rule 8 of the Supreme Court of the United States, and for the purpose of enabling the Clerk to prepare the record for appeal herein from the decision of the District Court to the Supreme Court of the United States, hereby requests the Clerk to incorporate into the transcript of the record for such appeal that portion of the record embracing the decision of the Interstate Commerce Commission in the original complaint of the plaintiff herein, attached as Exhibit "A" to the plaintiff's bill of complaint in this cause.

B. E. Eaton, as Attorney for Defendant in Error.

I hereby accept service of a copy of the foregoing præcipe and waive all other or further service or notice thereof.

This the 29th day of February, 1924.

Brenton K. Fisk, as Attorney for Plaintiff in Error.

[fol. 53] [File endosement omitted.]

[fols. 54-60] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Jack Thompson, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify the above and foregoing to be a full, true and correct transcript of the record in the case of William Danzer & Company, Inc. a corporation, Plaintiff in Error, vs. Gulf & Ship Island Railroad Company, a corporation, Defendant in Error, according to the præcipe of the Plaintiff in Error, hereto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office in the City of Meridian, this 5th day of March, 1924.

Jack Thompson, Clerk of the District Court of the United States for the Southern District of Mississippi. (Seal of of the U. S. District Court, Southern District of Mississippi.)

Endorsed on cover: File No. 30,235. S. Mississippi D. C. U. S. Term No. 346. William Danzer & Company, Inc., plaintiff in error, vs. Gulf & Ship Island Railroad Company. Filed March 31st, 1924. File No. 30,235.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 346.

WILLIAM DANZER & COMPANY, INC., A CORPORATION, PLAINTIFF IN ERROR,

vs.

GULF & SHIP ISLAND RAILROAD COMPANY, A CORPORATION, DEFENDANT IN ERROR.

BRIEF.

This case has come up on writ of error from a judgment of the United States District Court for the Southern District of Mississippi.

The action was based upon a reparation order of the Interstate Commerce Commission and was authorized under section 16, Interstate Commerce Act.

The complaint was drawn in the simple form prescribed by said section 16 and contained, as a part thereof, the findings of fact and order of the Commission. The defendant in error interposed a demurrer, based on three grounds, namely: (1) Section 206 (f), "Transportation Act of 1920" violates the Fifth Amendment to the Constitution inasfar as it in terms renews reparation claims which had become barred; (2) the defendant in error's right to a jury trial was being violated by the proceeding; (3) the Commission had exceeded its lawful authority.

The cause was submitted under a stipulation that

the court should render final judgment, if not on the demurrer then on the general issue and the facts as set out in the findings of the Commission. The court, as aforestated, sustained the demurrer and rendered final judgment thereon, holding that the Constitution prevents retroactive effect to be given section 206 (f) in respect to proceedings for reparation. Since said section refers specifically to reparation proceedings and since it can have no effect whatsoever with respect to such cases unless it be construed retroactively, the decision therefore means that the portion of the statute which refers to reparation proceedings is void under the Constitution.

Writ of error was taken, therefore, directly to the Supreme Court.

The finding of facts by the Commission, as incorporated into the complaint, present the case as it was put before the lower court and (the caption being omitted) was as follows:

"Report of the Commission.

"Division 3, Commissioners Hall, Eastman, and Campbell by Division 3:

"Exceptions were filed by complainant to the report proposed by the Examiner. We have reached conclusions differing from those which he recommended.

"Complainant, a corporation buying and selling lumber at Hagerstown, Md., by complaint filed February 14, 1921, seeks reparation for damages alleged to have been suffered by it through the misrouting of a carload of lumber. On brief, the Pennsylvania Railroad, one of the defendants, urges that complainant's claim was barred by the statute of limitations at the time of the passage of the transportation act, 1920, and that it was not revived by section 206 (f) of that act, providing that the period of Federal control should not be computed as part of the

periods of limitation in claims for reparation arising prior to Federal control. We have found otherwise. Mulkey Salt Co. *vs.* Director General, 61 I. C. C., 669.

"The shipment, consisting of 96,050 feet of 4-foot No. 2 standard yellow pine lath, weighing 56,100 pounds, was delivered to the Gulf & Ship Island at Lyman, Miss., August 30, 1917, by the Ingram-Day Lumber Company, consigned to V. W. Long Lumber Company, Wilkes-Barre, Pa., routed 'N. & W. and Hagerstown.' (fol. 5) The same day complainant purchased it as a 'speculative buy' and in due course came into possession of the bill of lading. On September 5 it wrote to the Division Freight Agent of the Pennsylvania at Harrisburg, Pa., and to representatives of the Cumberland Valley at Chambersburg, Pa., and Hagerstown, requesting that the car 'be held in transit for diversion.' Complainant resold the lath at $5.00 per 1,000 feet and forwarded the invoice to its customer who, in urgent need of such material, had contracted for it because it was in transit. The Gulf & Ship Island made several attempts to forward the car in accordance with routing instructions by transferring it to the New Orleans & Northeastern at Hattiesburg, Mississippi, but that carrier refused to receive it because of an embargo. Eventually, on September 15, the Gulf & Ship Island turned the car over to the Louisville & Nashville, at Gulfport, Mississippi. Moving over the Louisville & Nashville to Louisville, Ky., and Pennsylvania lines beyond, the car arrived in Wilkes-Barre about October 3 without passing through Hagerstown. The shipment was therefore misrouted.

"It appears that when complainant's customer was advised of the arrival of the car at Wilkes-Barre it cancelled the order. While the car was held on the initial line some fourteen or fifteen days, there is no evidence that the sale made by complainant was revoked or that it was obliged to recall its invoice until informed that

the car had arrived at Wilkes-Barre. The Pennsylvania refused to forward the car to Hagerstown unless all charges were paid, including demurrage which had accrued as well as the charges for the (fol. 6) movement from Wilkes-Barre to Hagerstown, and complainant declined to accept delivery. Thereupon the lath was sold at auction by the Pennsylvania for $200.00 and the proceeds applied in partial satisfaction of transportion, demurrage, storage and unloading charges aggregating $473.51.

"Complainant contends that the Gulf & Ship Island could and should have forwarded the car via Gulfport, Miss., and either over the Louisville & Nashville to Birmingham, Ala., Alabama Great Southern to Chattanooga, Tenn., Southern to Bristol, Tenn., and Norfolk & Western to Hagerstown, or over the Louisville & Nashville to Norton, Va., and Norfolk & Western to Hagerstown. The record indicates that these routes were open and that the shipments could have moved via either.

"Defendants contend that we are without jurisdiction to award damages for loss, damage, delay or conversion of property. In L. & N. R. R. Co. *vs.* Ohio Valley Tie Company, 342 U. S., 288, the Supreme Court said:

> " 'The Court of Appeals decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge and that the satisfaction of the Commission's award still left open an action in the state courts to recover what are termed general damages—such as are supposed to have been recovered in this case. In this we are of the opinion that the court was wrong.
>
> " 'By Section 8 a common carrier violating the commands of the act is made liable to the person injured thereby "for the full amount of damages sustained in consequence" of the

violation. By Section 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule (fol. 7) of damages in one can hardly be different from that proper in the other. . . . The decisions say that whatever the damages were they could be recovered; Pennsylvania R. R. Co. *vs.* International Coal Mining Co., 230 U. S., 184, 202, 203; Meeker *vs.* Lehigh Valley R. R. Company, 236 U. S., 412, 429; and the statute determines the extent of damages. Pennsylvania Railroad Company *vs.* Clark Brothers Coal Mining Co., 238 U. S., 456, 472. We are of opinion that all damages that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damages to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid.'

"The misrouting here was clearly a violation of the interstate commerce act, and the complainant having elected to prosecute its claim before us we may award reparation for whatever damages resulted as a consequence of such unlawful act.

"Witness for complainant testified that the reasonable market value for the lath at Wilkes-Barre in October, 1917, was $5.00 per 1,000 feet or about $480.00 for the entire shipment, and at Hagerstown $4.95 per 1,000 feet. Freight charges from Lyman to Hagerstown over the designated route would have been $168.30.

"We find that complainant made the shipment as described; that it was misrouted; that complainant was damaged by the misrouting in the

amount of the difference between $475.45, which we find to be the fair market value of the lumber in September and October, 1917, at Hagerstown, and $168.30, the freight charges from Lyman to Hagerstown, this difference being $307.15; and that it is entitled to reparation from the Gulf & Ship Island Railroad Company in the sum of $307.15, with interest.

"An appropriate order will be entered.

"(fol. 8) Hall, Commissioner, dissenting in part:

"I agree that this shipment was misrouted. The burden is upon complainant to show that the misrouting was the proximate cause of damage. This has not been done. The record does not show when or why the sale by complainant to the Lebanon Box Company was revoked. It may have been before the car left the Gulf & Ship Island and because of delay regardless of the route of movement. The Lebanon Box Company was in need of lath and agreed to buy this lath because it was in transit and quick delivery could be looked for. Complainant refused to accept delivery at Wilkes-Barre, the billed destination, although there had been no reconsignment and the charges were the same over the route of movement as over the route designated by the consignor.

"If it were shown that the loss of the sale to the Lebanon Box Company resulted from the misrouting, there would still be no warrant for fixing the amount of damage at the market price of the lath at Hagerstown less the freight to that point. The record does not show that this company was located at Hagerstown or that under the terms of sale the lath was to be delivered there. The instructions that the car 'be held in transit for diversion' were addressed to representatives of the Pennsylvania at Harrisburg and the Cumberland Valley at Chambersburg, as well as the representative of the latter road at Hagerstown.

> "The shipment moved nearly five years ago. Complainant has not proved its case, if it has one, and the complaint should be dismissed."

The assignments of error on which the plaintiff in error relies are as follows:

First. The Court erred in sustaining the demurrer of defendant to the petition of the plaintiff.

Second. The Court erred in holding Section 206 (f) of the "Transportation Act of 1920," in its application of this case, to be in violation of the Fifth Amendment to the Constitution of the United States.

Third. The Court erred in holding that the Fifth Amendment to the Constitution of the United States necessitates a construction of section 206 (f), "Transportation Act of 1920," which excludes the present cause from the operation and benefit thereof.

(fol. 39) Fourth. The Court erred in entering judgment in favor of the defendant.

PERIOD OF LIMITATION.

I.

It would imperil constitutional government for the courts unnecessarily to adopt rules of construction which would render statutes inoperative. Hence, even every word and phrase of a statute must be accorded some operative effect and meaning if possible.

Louisville & Nashville R. Co. vs. *Mottley*, 219 U. S., 467.

Washington Market Co. vs. *Hoffman*, 101 U. S., 115.

United States vs. *Lexington Mill Co.*, 232 U. S., 399.

United States vs. *Fisher*, 109 U. S., 145.

Blair vs. *Chicago*, 201 U. S., 400.

United States vs. *United Verde Copper Co.*, 196 U. S., 207.
Brunswick Terminal Co. vs. *Baltimore Nat'l Bank*, 192 U. S., 386.

II.

Section 206 (f) "Transporation Act of 1920," expressly designates "claims for reparation to the Commission for causes of action arising prior to Federal control" and provides that "the period of Federal control shall not be computed as a part of the period of limitations" in such actions.

Transportation Act of 1920, sec. 206 (f).

III.

The only "period of limitation" applicable to "claims for reparation to the Commission" during the period of Federal control was two years.

Interstate Commerce Act, sec. 16.
Lakewood Engineering Co. vs. *New York Central*, 2 F (2d) 121.

IV.

Congress leaves no doubt of the fact that the term, "Federal control," as used in the "Transportation Act of 1920," relates back to the seizure by the President under his proclamation of December 26, 1917—a period of more than two years' duration.

Transportation Act of 1920, sec. 2.

V.

Since the period of Federal control exceeded the limitation period on reparation claims, it is evident that those provisions of section 206 (f), "Transportation

Act of 1920," which specifically relate to reparation claims antedating Federal control must be construed either retroactive or, in the alternative, wholly void.

VI.

In the exercise of its paramount discretion and authority, not only in carrying on war in the field but also in counteracting the misfortunes caused by war, Congress had full power to restore civil rights which had lapsed while the nation was engaged in hostilities.

Stewart vs. *Kahn*, 11 Wall., 493.
Mayfield vs. *Richards*, 115 U. S., 137.
Wenatchee Produce Co. vs. *Great Northern Ry. Co.*, 271 Fed. 784

VII.

Section 206 (f), "Transportation Act of 1920," in its application to reparation claims, is both retroactive and valid.

Lakewood Engineering Co. vs. *New York Cent. R. Co.* 2 F. (2d), 121.
San Diego & A. Ry. Co. vs. *A. T. & S. F. Ry. Co.*, 293 Fed., 139.
Arcadia Mills vs. *Carolina C. & O. Ry.*, 293 Fed., 639.

TRIAL BY JURY.

VIII.

It is well settled that the defendant's right to a jury trial was adequately preserved by section 16, Interstate Commerce Act.

Meeker vs. *Lehigh Valley R. Co.*, 236 U. S., 412.

POWERS OF THE COMMISSION.

IX.

The shipper having designated a prescribed route for the shipment of his freight, it was the duty of the carriers under the Interstate Commerce Act to observe the shipper's limitations on their authority.

Interstate Commerce Act, sec. 15.

X.

Failure to observe the requirements of the Interstate Commerce Act gave lawful ground for an action against the carriers before the Commission.

Interstate Commerce Act, sec. 9.

XI.

Since the plaintiff elected to bring an action before the Commission, it was the duty of the Commission to award both general and special damage.

Louisville & Nashville R. Co. vs. *Ohio Valley Tie Co.*, 242 U. S., 288.

XII.

By taking plaintiff's property away from the prescribed route and losing it, so that it could not be stopped enroute and diverted, the plaintiff was given the right, at its own election, to consider the bailment ended by the unlawful divestiture of plaintiff's authority over it and to hold the carriers responsible for the value of the lost property.

Phillips vs. *Brigham*, 26 Ga., 617, 71 Am. Dec., 227, quoting *Wheelock* vs. *Wheelwright*, 5 Mass., 104.

A. T. & S. F. Ry. Co. vs. *Schriver* (Kans.), 84 Pac., 119, 4 LRA.(NS.), 1056.
Lewis vs. *Galena & C. V. R. Co.*, 40 Ill., 281.
M. S. & N. I. R. Co. vs. *Day*, 20 Ill., 375.
Southern V. The South Staffordshire Ry. Co., 18 Ex., 341, 22 L. J. Ex., 121, 17 Jur., 241, 1 W. R., 154, 155 Eng. Reprint 1378.

XIII.

Since the breach of the Interstate Commerce Act in this case was tantamount to a conversion of the property, the same sound legal rules whereby damages are assessed for conversion of property are applicable and the defendant is liable to the plaintiff for the value of its lost carload of lumber.

XIV.

The plaintiff, if successful in the present action, will be entitled to have a reasonable amount, in addition to other costs, taxed against defendant as an attorney's fee.

Interstate Commerce Act, sec. 16.

Conclusion.

It appears from the aforequoted cases and authorities that section 206 (f) "Transportation Act of 1920" refers to two different and distinct characters of proceedings, namely:

1. "Actions at law."

2. "Claims for reparation to the Commission *for causes of action arising prior to Federal control.*"

The court has held in the case of *Fullerton-Krueger Lumber Co.* vs. *Northern Pacific R. Co.*, (45 Sup. Ct. Rep.,

143), that the limitation contained in the italicized words aforequoted do not relate to "actions at law."

It is respectfully submitted that there is no excape from a construction which gives these words full application to "claims for reparation." Since there were no such claims which remained unbarred by limitations when the "Transportation Act of 1920" was enacted, the words must necessarily have a retroactive application, if any.

The manifest advantage of trying cases like the present before a commission outweigh all valid objections. How was the plaintiff to know who was at fault for misrouting his goods? Did the Gulf & Ship Island Railroad Company fail to convey to connecting carriers the shipper's routing instructions? Did a connecting carrier violate the instructions with knowledge of them? If so, which of the several carriers was at fault?

At law, several suits would practically have been necessary—one against each separate carrier. Several bills for discovery might have been necessary. Even then, the possibility of securing a just recovery would have been doubtful.

Before the Commission, all participating carriers were joined in a single action. The evidence was principally given by the carriers in an effort to fix liability among themselves. There was little cost, a minimum of delay, *and a just determination.*

In the simplification of procedure, this case, we hope, will have an important place. Many similar cases can be adjusted informally by the Commission without suit, if once its power in such matters is clearly established.

Very respectfully submitted,

BRENTON K. FISK,
Attorney for Plaintiff in Error.

Brenton K. Fisk

DEFENDANT'S BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1924

No. 346

WILLIAM DANZER & COMPANY, INC., a corporation,

Plaintiff in Error,

vs.

GULF AND SHIP ISLAND RAILROAD COMPANY, A Corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Section 206-f of the transportation act violates the fifth amendment of the constitution and is void if intended to revive causes of action barred at the time of its enactment under section 16 of the act to regulate commerce. Section 16 of the act to regulate commerce provides:

> "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after."

Section 206-f of the transportation act of 1920 provides:

> "The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims

for reparation to the Commission for causes of action arising prior to federal control."

A complaint was filed with the Interstate Commerce Commission on February 14, 1921, seeking damages for the misrouting of a shipment which was delivered to the carrier August 30, 1917, and which was refused at destination because of the misrouting on October 3, 1917. The cause of action accrued therefore about two and a half years before the enactment of the transportation act. It accrued three and a half years before complaint was filed. The Interstate Commerce Commission held that section 206-f of the transportation act revived the cause of action and ordered reparation. On a suit brought to enforce the order of the Commission the lower court held that such construction would violate the fifth amendment and render the section void.

The present issue is, first, whether the construction of the Interstate Commerce Commission is correct, and, second, whether the act is constitutional if given this construction.

The Interstate Commerce Commission has no common law jurisdiction. It is a creature of statute and can deal with only such subjects and administer only such relief as are delegated to it by acts of congress creating it and fixing its jurisdiction. These are both created and limited in accordance with the provision of section 16 of the act to regulate commerce. A statute creating a cause of action or a remedy and providing a time within which rights thereunder may be asserted is not an ordinary statute of

limitation, but a limitation upon the cause of action. The time limit is itself a part of the cause of action. If complaint be not filed within the time limit, the cause of action dies. That section 16 is such a statute has been twice decided in this court. In *A. J. Phillips Company v. Grand Trunk Western Railway* (236 U. S. 662, 59 L. ed. 774) the court held:

> "Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. U. S., 123 U. S. 227, 232, 31 L. ed. 128, 130), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction."

In *Kansas City Southern Railway Company v. Wolf* (261 U. S. 133, 67 L. ed. 571) the court held:

> "The lapse of time had destroyed any liability by the carrier to the shipper or his assignee."

These decisions are in complete harmony with the general construction of other statutes creating causes of action with time provisions. In *Finn v. U. S.* (123 U. S. 227, 31 L. ed. 128) suit was instituted in the court of claims against the United States after the expiration of the time fixed in the statute within which such suits might be brought. The court held the time limit to be "a condition or qualification of the right to a judgment against the United States." The same construction applies to Lord Campbell's Act providing for the recovery of damages for wrongful death. In *The Harrisburg v. Rickards* (119 U. S. 199, 30 L. ed. 358) the court held:

> "The time within which the suit must be brought operates as a limitation of the liability itself as created and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded."

It may be conceded, under the doctrine of *Campbell v. Holt* (115 U. S. 620, 29 L. ed. 483) that congress may remove the bar of an ordinary statute of limitation even after the right of defense thereunder has attached. but the doctrine of the Holt case does not apply to the character of limitation in section 16 of the act to regulate commerce or to other statutes of the kind before referred to. The ordinary statute of limitation (the kind construed in the Holt case) is no part of the cause of action. It is no condition of the right to sue. It is simply a bar created by statute to prevent a suit upon a cause of action already existing at common law which, but for the bar, would continue indefinitely. Such a period of limitation is in striking contrast to that found in section 16. For example, the Holt case declares that an ordinary statute of limitation is waived unless specially pleaded, but a carrier of interstate commerce is not permitted to waive the time limit of section 16. The case of *A. J. Phillips v. Grand Trunk Western Railway*, heretofore cited, holds:

> "The obligations of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers

> either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defences open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here, and could do so here by general demurrer."

The Holt case declares that the limitation there considered "does not destroy the right in foro conscientiae to the benefit of assumpsit, but only bars the remedy if the defendant chooses to rely on the bar." Under the Phillips case the court said: ". . . the lapse of time not only bars the remedy, but destroys the liability."

The fundamental difference in these statutes becomes more apparent in considering another phase of this case. If plaintiff in error had filed its complaint before the Interstate Commerce Commission after October 3, 1919 (the date of the expiration of the two year limit) and prior to February 29, 1920 (the date of the enactment of the transportation act), the carrier would have been compelled to interpose as a defense the expiration of the time limit within which suit might have been brought. The commission would have been compelled under the Phillips case to sustain the defense. Sufficient time in fact existed for the suit to have been filed and tried between October 3, 1919 and February 29, 1920. Suppose this had been done. By operation of law, the same law that created the right of action, the carrier acquired a vested right of defense on October 3, 1919, which defense could not have been waived. A cause of action, unlike the bar of a statute of limitation, that has ceased to exist is the same as a cause of action which never existed. Under such circumstances section 5 of the constitution prevents congress from reviving it. The principle is decided in *Pritchard v. Norton* (106 U. S. 124; 27 L. ed. 104):

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it

> away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity and justice."

Apparently the precise question presented in this case was decided in the recent case of *Fullerton-Krueger Lumber Company vs. Northern Pacific Railway Company* (45 Sup. Ct. Rep. 143, 69 L. ed. —) on January 5, 1925. The court held that section 206-f of the transportation act would not be held to apply to a cause of action barred before the act became effective.

Plaintiff in error argues that the Fullerton decision is inapplicable to the instant case because the instant case is an action at law and the Fullerton case was not. However, no such distinction is drawn in the Fullerton case, nor does it seem to be implied. In reality, the right asserted in the Fullerton case and the right asserted in the instant case are both conferred by the act to regulate commerce. In the Fullerton case a recovery was sought for damages in excess of the lawfully published tariff rate. In this case a recovery is sought for the failure of the carrier to follow the routing instructions of the shipper. At common law the shipper had no right to route the shipment. The carrier's obligation was simply to effect delivery. The shipper could not control the agencies through which the delivery was to be effected. It is not, however, of any material con-

sequence how this or any other claim predicated upon the act to regulate commerce be characterized. Such claim if filed at all with the Interstate Commerce Commission must be filed within two years from its accrual, for section 16 specifically prohibits "all claims for the recovery of damages" filed thereafter. As this complaint was filed after it had been destroyed, it would seem to come squarely within the doctrine of the Fullerton case.

Another argument advanced to support the constitutionality of section 206-f of the transportation act is that congress was exercising a war power. The transportation act was legislation distinctly looking forward to the restoration of the railroads to their former owners. It did not, even remotely, affect the conduct of the war, but, if it had, it is not true that congress has the right to destroy constitutional guaranties and rights even in time of war. A leading case on this subject is *Johnson v. Jones* (44 Ill. 142, 92 Am. Dec. 159). The precise question has been lately decided by this court, in *United States v. Cohen Grocery Company* (255 U. S. 81, 65 L. ed. 516), and in *Kennington v. Palmer* (255 U. S. 100, 65 L. ed. 528). In the Cohen case Chief Justice White stated:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaran-

> ties and limitations of the 5th and 6th Amendments as to questions such as we are here passing upon. . . . It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."

Section 206-f obviously cannot be defended as a war measure, for the further reason that the war did not restrict the plaintiff in the exercise of any of its rights against the defendant. There was no time between the accrual of the right of action and its expiration when plaintiff could not have filed its complaint with the Interstate Commerce Commission and secured redress. If section 206-f was intended by congress to be given a retroactive construction, it was not a war measure it was enacting but a measure calculated to protect negligent complainants from the results of their own inexcusable delay.

If, as the court decided in the Fullerton case, section 206-f is to be given prospective application only or if it is held that it does not revive a cause of action already barred, then no constitutional question is presented in this case, but if congress intended that the act should apply to cases already barred under section 16 of the act to regulate commerce, then it is respectfully submitted that with reference to a case barred it is violative of the 5th amendment and void.

In the court below it was argued that the Interstate Commerce Commission was without constitutional authority to pass upon this case for the reason that the defendant was entitled upon the issue of fact involved to a trial by jury. The presiding judge, however, did not pass upon this point, hence it will not be argued at this time.

Respectfully submitted,

B E Eaton

Attorney for Defendant in Error.

I hereby certify that on this, the 3 day of April, 1925, I forwarded, postage prepaid, three copies of this brief to Mr. Brenton K. Fisk, Attorney of record for plaintiff in error.

B E Eaton

Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 346.—October Term, 1924.

William Danzer & Company, Inc., Plaintiff in Error, *vs.* Gulf & Ship Island Railroad Company.	In Error to the United States District Court, Southern District of Mississippi.

[June 8, 1925.]

Mr. Justice Butler delivered the opinion of the Court.

Plaintiff in error brought this action to recover the amount of damages awarded against defendant in error by the Interstate Commerce Commission. August 30, 1917, at Lyman, Mississippi, the Ingram-Day Lumber Company delivered to defendant in error a carload of lath consigned to the V. W. Long Lumber Company at Wilkes-Barre, Pennsylvania. The shipment was directed to be moved via a line of the Norfolk & Western Railway Company through Hagerstown, Maryland. On the day the shipment was made, plaintiff bought the lath, and in due time received the bill of lading. Defendant misrouted the car; and in consequence plaintiff suffered damages. February 14, 1921,—after the expiration of the two-year period prescribed for filing claims for damages, —plaintiff made complaint for reparation to the Interstate Commerce Commission against defendant and three connecting carriers. May 18, 1922, the commission made its report and order. The contention on the part of the carriers, that plaintiff's right expired before the passage of the Transportation Act, 1920, c. 91, 41 Stat. 456, and was not revived by § 206 (f), was overruled. The commission's order authorized and directed the defendant, on or before August 2, 1922, to pay $307.15 with interest to plaintiff as reparation for damages sustained in consequence of the misrouting. Defendant failed to pay the award, and this suit was brought, May 7, 1923. The complaint set forth the facts above stated. Defendant demurred on the ground, among others, that § 206 (f), as construed and applied by the commission was

unconstitutional; and that so to renew or revive the cause of action, which had expired before the passage of the Transportation Act was to take defendant's property without due process of law in contravention of the Fifth Amendment. The district court sustained the demurrer and gave judgment for defendant. The case is here on writ of error. § 238, Judicial Code.

Plaintiff's cause of action was created and limited by the Interstate Commerce Act. That act imposes upon the initial and other carriers the duty to route and transport freight in accordance with the shipper's instructions. § 15 (8). And the carrier is liable to any person injured for the full amount of damages sustained in consequence of a breach of that duty. § 8. Any person claiming to be damaged by any carrier may make complaint to the commission. §§ 9, 13. "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after . . ." § 16(3). "The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control." § 206 (f). If after hearing, the commission shall determine that complainant is entitled to damages under the act, it is required to make an order directing the carrier to pay the amount so awarded on or before a day named. And, if the carrier fails to comply, the person for whose benefit the order was made, within one year from the date of the order, may file petition in the United States district court, setting forth briefly the causes for which he claims damages and the order of the commission in the premises; and, subject to some provisions which are not important here, the suit proceeds like other suits for damages. § 16 (2), (3).

Plaintiff's right to file his claim with the commission had expired several months before the passage of the Transportation Act. But, if the period of federal control is to be excluded, the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the commission and had no cause of action. It is settled by the decisions of this court that the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 666; *Louisville Cement Co.* v. *Interstate Commerce Commis-*

sion, 246 U. S. 638, 642; *Kansas City Southern Ry.* v. *Wolf,* 261 U. S. 133, 139. On the expiration of the two-year period, it was as if liability had never existed. And this court applying the rule of construction that all statutes are to be considered prospective unless the language is express to the contrary or there is a necessary implication to that effect, recently has held that § 206 (f) does not apply to causes of action which were barred by a state statute of limitations before the passage of the Transportation Act. *Fullerton Company* v. *Northern Pacific,* 266 U. S. 435, 437.

Plaintiff suggests that the only period of limitations applicable to claims for reparation is that prescribed by § 16 (3), and argues that, as the period of federal control exceeded two years, § 206 (f) must be construed retrospectively or given no effect.

We need not re-examine the doctrine of *Campbell* v. *Holt,* 115 U. S. 620, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained and that such repeal did not deprive the debtor of his property without due process of law in violation of the Fourteenth Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act; (*The Harrisburg,* 119 U. S. 199, 214) and those arising under the Federal Employers' Liability Act, c. 149, 35 Stat. 65. *Central Vermont Ry.* v. *White,* 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette,* 239 U. S. 199, 201; *Kannellos* v. *Great Northern Ry. Co.,* 151 Minn. 157, 160; *Jones* v. *D. L. & W. R. R. Co.,* 96 N. J. L. 197. See also *Davis* v. *Mills,* 194 U. S. 451, 454. This case belongs to the latter class. Section 206 (f) will not be construed retroactively to create liability. To

give it that effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment. Cf. *Levy* v. *Wardell*, 258 U. S. 542, 544; *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 340; *Union Pacific R. R.* v. *Laramie Stock Yards*, 231 U. S. 190, 200; *Winfree* v. *Northern Pacific Ry. Co.*, 227 U. S. 296, 301.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.